Supreme Court, U.S.
FILED
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE AGUILAR ESPINOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

DID THE FIFTH CIRCUIT ERR IN HOLDING (CONTRARY TO THE NINTH CIRCUIT) THAT 18 U.S.C. § 876 DOES NOT REQUIRE SPECIFIC INTENT TO THREATEN?

INTERESTED PARTIES

The interested parties are Jessie Aguilar Espinoza, petitioner, and the United States of America, respondent.

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I. OPINIONS BELOW

The February 20, 2003, opinion of the Fifth Circuit Court of Appeals is unreported. *See* Appendix, Exhibit ("Ex.") A. The February 1, 2002, opinion of the district court is unreported. *See* Ex. B.

II. JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

III. STATUTORY PROVISION INVOLVED

18 U.S.C. § 876 provides:

> Whosoever knowingly so deposits or causes to be delivered as aforesaid, any communications with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

IV. STATEMENT OF THE CASE

In this petition, Mr. Jessie Aguilar Espinoza asks the Court resolve a split among the circuits in interpreting an

important federal statute by correcting the Fifth Circuit's statutory interpretation which led to his prison term.

On January 1, 2001, Mr. Espinoza was charged with violating 18 U.S.C. § 876 (mailing threatening communications). Mr. Espinoza motioned to dismiss the charge because the indictment does not plead that Mr. Espinoza intended to threaten anyone (i.e., the indictment did not allege specific intent) and the Ninth Circuit has previously held that such a pleading is required under the statute. The district court denied Mr. Espinoza's motion. After Mr. Espinoza pled guilty, he was sentenced to 46 months of imprisonment. (*See* Ex. C.)

Mr. Espinoza's subsequent appeal to the Fifth Circuit on the motion to dismiss was denied in direct contradiction to the Ninth Circuit's prior holding. Now, Mr. Espinoza comes before the U.S. Supreme Court to ask that the certiorari be granted so that the Court may resolve the split among the circuits and rule that the plain language of § 876, not the

Fifth Circuit's erroneous interpretation of that statute, governs.

V. REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONTRADICTORY INTERPREPETATIONS OF 18 U.S.C. § 876 AMONG CIRCUIT COURTS

Under a number of federal statutes, including 18 U.S.C. § 876 at issue here, it is a crime to deliver threats. However, the circuit courts are split on whether or not these statutes require proof of "specific intent" to threaten or merely proof of "general intent."

The Ninth Circuit has squarely held that proof of "specific intent to threaten is required under § 876...." *See United States v. King*, 122 F.3d 808, 811 (9th Cir. 1997). In contrast, the Fifth Circuit, in the instant case, held that violation of the same statute is "a general intent crime" and does **not** require proof of specific intent. *See* Ex. A; *see also United States v. DeShazo*, 565 F.2d 893, 894-95 (5th Cir.

1978) (holding that 18 U.S.C. § 876 does not require intent to threaten). In other words, the Fifth Circuit held here that Mr. Espinoza could be convicted under § 876 even where the government did not plead that he intended to threaten anyone.

Additionally, the Eleventh Circuit has also ruled, contrary to the Ninth Circuit, that 18 U.S.C. § 876 is a general intent crime. *See United States v. Costello*, 760 F.2d 1123, 1127-28 (11th Cir. 1985) (§ 876).

The circuit split has led to an unjust situation where Mr. Espinoza now faces nearly four years in prison under Fifth Circuit law even though he would be free of these charges had the Ninth Circuit heard his case. Under these circumstances, this Court's resolution of the circuit split is critical. *See, e.g., Richardson v. United States*, 526 U.S. 813, 816 (1999) (granting certiorari where the Court recognized a split among the circuits in interpreting a criminal statute).

B. THE FIFTH CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 876 IS INCORRECT

1. The Plain Language of the Statute Requires that the Threat be Made "Knowingly"

The plain language of 18 U.S.C. § 876 requires that a person must "knowingly" deliver "communications … containing a threat" to another. A person certainly cannot "know" they are delivering a threat without also intending that the communication actually be a threat.

The best definition of "knowingly" in the context of criminal statute comes from § 2.02 of the Model Penal Code which states that "[a] person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist…." Under the Model Penal Code definition, a person cannot "knowingly" deliver a threatening communication unless they are aware that

"circumstances exist" such that the communication is threatening. Without that person specifically intending that the communication be threatening, how could they possibly be aware it is threatening?

Yet the Fifth Circuit's statutory interpretation erases the "knowingly" requirement by holding that 18 U.S.C. § 876 does not require any specific intent to threaten. Indeed, in this respect, the instant case is different from the Fifth Circuit's *en banc* holding in *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997), since *Myers* held that 18 U.S.C. § 875(c) does not require specific intent, but Congress did **not** include any "knowingly" requirement in that statute.

The Ninth circuit has acknowledged that when Congress uses the word "knowingly" the language normally adds a subjective element to the crime. *See U.S. v. Twine*, 852 F.2d 676, 680-81 (9th Cir. 1988). Indeed, if Congress did not want intent to threaten to be an element of § 876, it could have omitted the word knowingly just as it did with respect to

18 U.S.C. § 875(c). Here, the Court should follow the Ninth Circuit's plain language reading of § 876 rather than the interpretation offered by the Fifth and Eleventh circuits. *See, e.g., United States v. Menasche*, 348 U.S. 528, 539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotes omitted).

2. The Fifth Circuit's Interpretation is so Overbroad it Would, if Adopted, Render the Statute Unconstitutional

Under the Fifth Circuit's reasoning, a person can be convicted under § 876 for mailing a communication even if that person does not intend that the communication be a threat. This interpretation should be rejected because it would render § 876 unconstitutionally broad both on its face and as applied here for at least two reasons. *See, e.g., Branch v. Smith*, 123 S.Ct. 1429, 1441 (2003) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result").

First, Congress has no authority to pass a law that broadly makes delivery of communications a crime even where no one intends the communications to be threatening. This Court has previously ruled that the U.S. Constitution's Commerce Clause cannot justify Congressional attempts to punish gender-motivated crimes of violence and possession of firearms in a school-zone. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In each instance, this Court found that the activity Congress attempted to punish properly fell within the states' sphere of influence and that the punished activity was not economic activity. Certainly, if § 876 is interpreted so that it punishes intrastate communication even where that communication is not intended as a threat, § 876 would also be unconstitutional under this reasoning.

Indeed, the particular application of the Fifth Circuit's version of § 876 in the present case is especially troubling since Mr. Espinoza's alleged conduct (mailing a threatening

letter from within Texas to a Texas recipient) occurred entirely within the state of Texas. The Fifth Circuit's holding here that an individual communicating within a single state without the intention of threatening might violate federal law would make § 876 unconstitutionally broad.

Second, the Fifth Circuit's interpretation of § 876 should be avoided because it would render § 876 unconstitutional under the First Amendment of the United States Constitution. Certainly, the First Amendment does not give anyone a right to intentionally threaten others. *See Watts v. United States*, 394 U.S. 705, 707 (1969). However, as this Court acknowledged in *Watts*, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Here, under the Fifth Circuit's interpretation, § 876 makes speech illegal even if the speaker does not intend it to be a threat. Under this interpretation, a person can never know whether or not a communication might violate § 876. This interpretation cannot help but to have a chilling effect on

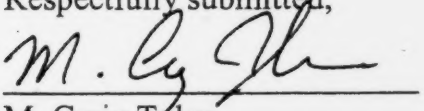
speech contrary to the language and longstanding principles of the First Amendment.

Since the Fifth Circuit's interpretation of § 876 would render the statute unconstitutional for the two reasons above, this Court should avoid that overly broad interpretation. Adoption of the Ninth Circuit's specific intent requirement for § 876 is narrowing yet also consistent to the statute's plain language. This Court should grant certiorari to correct the Fifth Circuit's error and promulgate an interpretive constitutional standard for § 876 that is consistent with the statute's language and is the same for every circuit.

VI. CONCLUSION

As a result of the Fifth Circuit's erroneous interpretation of 18 U.S.C. § 876, Mr. Espinoza now faces nearly four years imprisonment – a punishment he would not have faced under Ninth Circuit law. The Court should grant certiorari to correct the Fifth Circuit's error and to set forth one consistent standard for future prosecutions under § 876.

Respectfully submitted,



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Dated: May 21, 2003

APPENDIX

EXHIBIT A

United States Courts
Southern District of Texas
ENTERED
FEB 01 2002
Michael N. Milby
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

Cr. No. H-01-832-5

v.

JESSE AGUILAR ESPINOZA

ORDER

The defendant's motion to dismiss the superseding indictment is denied. It is so ordered.

Signed on this 1st day of February, 2002, at Houston, Texas.

s/Kenneth Hoyt
UNITED STATES DISTRICT JUDGE

EXHIBIT B

U.S. COURT OF APPEALS
FILED
FEB 20 2003
CHARLES R. FULBRUGE III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20474
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSIE AGUILAR ESPINOZA,

Defendant-Appellant.

- - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CR-832-1

- - - - - - - - - -

Before WIENER, EMILIO M. GARZA, and CLEMENT,

Circuit Judges.

PER CURIAM:*

Jessie Aguilar Espinoza appeals from a guilty-plea conviction for one count of mailing threatening communications in violation of 18 U.S.C. § 876. Espinoza argues that specific intent is an element of an offense under 18 U.S.C. § 876 that must be alleged in the indictment. Espinoza concedes that his argument is foreclosed by this circuit's law but seeks to preserve the issue for Supreme Court review. In United States v. DeShazo, 565 F.2d 893, 894-95 (5th Cir. 1978), this court held that an offense pursuant to 18 U.S.C. § 876 was a general intent crime. Accordingly, Espinoza's argument is foreclosed. The judgment is AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

EXHIBIT C

United States Courts
Southern District of Texas
ENTERED
APR 26 2002
Michael N. Milby
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston

UNITED STATES OF AMERICA

v.

JESSE AGUILAR ESPINOZA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:01CR00832-001

Brent Newton, AFPD
Defendant's Attorney

THE DEFENDANT:

Pleaded guilty to count(s) 1S on February 4, 2002.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 876	Mailing threatening communications	10/22/2001	1S

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 454-82-2374

Defendant's Date of Birth: 02/10/1949

Defendant's USM No.: 13719-179

Defendant's Residence Address:
234 Garrortsville
Houston, TX 77022

Defendant's Mailing Address:
234 Garrortsville
Houston, TX 77022

April 22, 2002
Date of Imposition of Judgment

s/Kenneth M. Hoyt
Signature of Judicial Officer

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

4/25/02
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 46.

This term consists of FORTY-SIX (46) MONTHS as to Count 1S. This term of imprisonment is ordered to run consecutive to the defendant's undischarged term of imprisonment he is presently serving as a result of his conviction in Harris County, Texas, under Cause Number 890155.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

This term consists of THREE (3) YEARS as to County 1S.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

See Additional Mandatory Conditions Sheet

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth

below). The defendant shall also comply with the additional conditions on the attached page.

STARDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall not permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as a informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

ADDITIONAL MANDATORY CONDITIONS

The defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample

is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addition, dependency or abuse which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the Program Director with the approval of the probation officer. The defendant shall further submit to drug-detection techniques, in addition to those performed by the treatment agency, as directed by the probation officer. The defendant will incur costs associated with such drug/alcohol detection and treatment, based on ability to pay as determined by the probation officer.

The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such a program, based on ability to pay as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
TOTALS	$100.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of $100 due immediately, balance due in accordance with E below:

E. Special instructions regarding the payment of criminal monetary penalties:

Make all payment payable to: U.S. District Clerk, Attn: Finance, P. O. Box 61010, Houston, TX 77208

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payment previously made toward any criminal monetary penalties imposed.

Supreme Court, U.S.
FILED
SEP 8 2003
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No. 02-1762

In the Supreme Court of the United States

JESSIE AGUILAR ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an indictment charging petitioner with knowingly mailing a threatening communication, in violation of 18 U.S.C. 876, was defective because it did not allege that petitioner intended that his communication would be understood as a threat.

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In the Supreme Court of the United States

No. 02-1762

JESSIE AGUILAR ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is unpublished, but the judgment is noted at 61 Fed. Appx. 921.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. The petition for a writ of certiorari was filed on May 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entry of a conditional guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of mailing a threatening communication, in violation of 18 U.S.C. 876. He was sentenced to 46 months of imprisonment, to be

followed by three years of supervised release. The court of appeals affirmed. Pet. App. B1-B2.

1. While petitioner was in county jail awaiting transfer to prison to serve a state sentence for assault and injury to the elderly, he mailed a letter to reporter Paige Hewitt at the Houston Chronicle. In the letter, petitioner stated that he had left a device containing anthrax in the central ventilation system of one of the Houston Chronicle's buildings and that the device was set to go off on October 31, 2001. He further stated that he had installed the anthrax device "[b]ecause I can"; that he had studied hazardous materials and bioterrorism since he was 12 years old; and that Houston was vulnerable because it was "easy to acquire entry" into its major buildings. He concluded the letter by warning Ms. Hewitt that she had "9 days to save [her] coworkers." He signed the letter with his name, "Jessie A. Espinoza." Gov't C.A. Br. 3; Presentence Report (PSR) paras. 5, 7.

On October 29, 2001, petitioner's letter arrived at the Houston Chronicle. The letter was forwarded to Ms. Hewitt's editor, who contacted security personnel. PSR paras. 4-5

2. A federal grand jury returned an indictment charging petitioner with mailing a threatening communication, in violation of 18 U.S.C. 876. In particular, the indictment charged that petitioner "knowingly did deposit in an authorized depository for mail matter * * * and knowingly caused to be delivered by the Postal Service * * * a written communication * * * containing a threat to injure another; that is, to release a biological agent, anthrax, 'in one of the Houston Chronicle's Buildings.'" Superseding Indictment 1.

Petitioner moved to dismiss the indictment on the ground that it failed to charge an element of the

crime—namely, that he specifically intended to threaten the recipient of the letter. The district court denied the motion. Pet. App. A.

Petitioner then pleaded guilty to the Section 876 charge, reserving the right to appeal the denial of his motion to dismiss the indictment. At the hearing at which he entered his guilty plea, petitioner admitted that he knowingly caused the letter to be mailed to Ms. Hewitt and that he intended to commit the acts set forth in the indictment. 2/4/02 Tr. 13, 15. At sentencing, petitioner stated that his motive for sending the letter had been to draw attention to abuses in the Texas state prison system. 4/22/02 Tr. 6, 9-10.

The district court sentenced petitioner to a 46-month term of imprisonment, to run consecutively to his state sentence. Pet. App. C3-C4.

3. The court of appeals affirmed petitioner's conviction in an unpublished per curiam opinion. Pet. App. B1-B2. The court rejected petitioner's claim that a defendant's specific intent to make a threat is an element of an offense under 18 U.S.C. 876 that must be alleged in the indictment. The court relied on circuit precedent holding that "an offense pursuant to 18 U.S.C. § 876 [is] a general intent crime." Pet. App. B2 (citing *United States* v. *DeShazo*, 565 F.2d 893, 894-895 (5th Cir.), cert. denied, 435 U.S. 953 (1978)).

ARGUMENT

Petitioner contends (Pet. 3-10) that the indictment in this case was defective because it did not allege that he acted with the specific intent to make a threat. The Fifth Circuit, consistently with most other circuits, has correctly held that 18 U.S.C. 876 and similar statutes do not require that a defendant subjectively intended that his communication be understood as a threat. It neces-

sarily follows that no such intent need be alleged in the indictment in a Section 876 prosecution. The Ninth Circuit, while construing Section 876 to require proof of the defendant's intent to threaten, has not held that such intent must be expressly alleged in the indictment. This case does not, therefore, implicate the narrow circuit conflict that petitioner identifies or otherwise warrant this Court's review. This Court recently denied certiorari in a case raising a similar claim under 18 U.S.C. 875(c). See *Morales* v. *United States*, 536 U.S. 941 (2002) (No. 01-8544).

1. The Federal Rules of Criminal Procedure describe an indictment as "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). On several occasions, this Court has held that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). As long as the statutory language itself expressly and unambiguously sets forth the elements needed to define the offense, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself." *Hamling*, 418 U.S. at 117.

The indictment in this case was sufficient under that standard. Petitioner was prosecuted under the first paragraph of Section 876, which has since been designated as Section 876(a). Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11008(d)(1), 116 Stat. 1818. As relevant here, that provision prohibits "knowingly deposit[ing]" in the mails "any communica-

tion" that contains "any threat to injure the person of the addressee or of another." 18 U.S.C. 876(a). The indictment, tracking the statutory language, charged that petitioner "knowingly did deposit" in the mails and "knowingly caused to be delivered by the Postal Service" a communication addressed to Paige Hewitt at the Houston Chronicle that "contain[ed] a threat to injure another; that is, to release a biological agent, anthrax, 'in one of the Houston Chronicle's Buildings.'" Superseding Indictment 1. The indictment fairly informed petitioner of the charge against which he had to defend, and was sufficient to enable him to assert a claim of double jeopardy in a future prosecution.

The indictment was not deficient for failing to allege that petitioner intended his communication to be understood as a threat. Ordinarily, in the absence of any indication by Congress to the contrary, "proof that the defendant acted knowingly is sufficient to support a conviction." *Bailey*, 444 U.S. at 408; see *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 523 (1994). As stated above, Section 876(a), by its terms, requires that a defendant "knowingly" mail a communication containing a threat, and the indictment accordingly alleged that petitioner acted "knowingly." Section 876(a) does not contain any requirement that the defendant acted with the specific intent to threaten. In contrast, Section 876(b) and Section 876(d) expressly require an "intent to extort," 18 U.S.C. 876(b) and (d), thereby providing additional indication that Congress did not mean to require an intent to threaten in Section 876(a).

The First Amendment does not require that a specific intent element be read into Section 876(a). The First Amendment is satisfied by confining Section 876(a) to "true" threats, *Watts* v. *United States*, 394

U.S. 705, 707-708 (1969) (per curiam)—that is, statements that "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 123 S. Ct. 1536, 1548 (2003). Such "true" threats are proscribable under the First Amendment in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Whether or not the person making such a communication acted with the specific intent to threaten, the fear and disruption engendered among its targets may well be the same. See, *e.g.*, *United States* v. *Kosma*, 951 F.2d 549, 556-557 (3d Cir. 1991).[1]

2. The courts of appeals, with one exception, have construed the various federal threat statutes, including the provision at issue here, to reach communications that, objectively viewed, constitute "true" threats. They have not required the government to prove that the defendant acted with the subjective intent to threaten. See, *e.g.*, *United States* v. *Whiffen*, 121 F.3d 18, 20-21 (1st Cir. 1977); *United States* v. *Francis*, 164 F.3d 120, 121-123 (2d Cir. 1999); *United States* v. *Himelwright*, 42 F.3d 777, 782-783 (3d Cir. 1994); *United States* v. *Worrell*, 313 F.3d 867, 874 (4th Cir.

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[1] While the Court stated in *Virginia* v. *Black* that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 123 S. Ct. at 1548 (emphasis added), the Court was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both). Since the Virginia law at issue required an intent to intimidate, the question was not squarely presented.

2002), cert. denied, 123 S. Ct. 1948 (2003); *United States* v. *Myers*, 104 F.3d 76, 80-81 (5th Cir.), cert. denied, 520 U.S. 1218 (1997); *United States* v. *DeAndino*, 958 F.2d 146, 148-149 (6th Cir.), cert. denied, 505 U.S. 1206 (1992); *United States* v. *Aman*, 31 F.3d 550, 553-556 (7th Cir. 1994); *United States* v. *Patrick*, 117 F.3d 375, 377 (8th Cir. 1997); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Costello*, 760 F.2d 1123, 1127-1128 (11th Cir. 1985).

In *United States* v. *Twine*, 853 F.2d 676, 681 (1988), the Ninth Circuit construed what is now Section 876(a)—as well as Section 875(c), which proscribes the transmission of threats in interstate commerce—to require a showing of "a subjective, specific intent to threaten" in order to convict. The court reasoned that such a requirement serves "to insure that no one would be convicted for an act because of mistake, inadvertence, or other innocent reason." *Id.* at 680; accord *United States* v. *King*, 122 F.3d 808 (9th Cir. 1997) (reaffirming *Twine* in a prosecution under Section 876).[2]

The Ninth Circuit's concern for persons who make threats because of "mistake, inadvertence, or other innocent reason[s]" is insubstantial. In a prosecution under Section 876(a), the government must prove not only that the defendant knowingly transmitted the communication, but also that the communication is a "true" threat as described above. It is doubtful that a defendant could be convicted under Section 876(a) for

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[2] By contrast, the Ninth Circuit, in accord with the other circuits, has held that specific intent to carry out the threat (or ability to do so) is not an essential element of the threat statutes. *United States* v. *Orozco-Santillan*, 903 F.2d 1262, 1265-1266 (9th Cir. 1990); *Twine*, 853 F.2d at 681 n.4.

the "mistake[n]" or "inadverten[t]" transmission of a threat even absent a specific intent requirement. Accordingly, the conflict created by the Ninth Circuit's decisions in *Twine* and *King* does not warrant this Court's review.

In any event, petitioner's reliance on *Twine* is misplaced. *Twine* does not hold that a defendant's specific intent to threaten must be alleged in the indictment in order to charge a Section 876 offense. Rather, *Twine* construed the term "knowingly" in Section 876 to include a specific intent to threaten. See 853 F.2d at 679-680. *Twine*'s construction of the term "knowingly," even if correct, would be of no assistance to petitioner, because the indictment in this case, by alleging that petitioner acted "knowingly," would thereby have met *Twine*'s requirement to allege that he acted with the subjective intent to threaten. Petitioner cites no decision of the Ninth Circuit, and the government is aware of none, holding that an indictment charging a violation of Section 876 is fatally deficient for failure to allege a specific intent to threaten.

3. Petitioner also asserts (Pet. 8-9) that, unless Section 876(a) is understood to require a subjective intent to threaten, Congress lacked the legislative authority to enact it. Petitioner is mistaken. Section 876(a), by its terms, applies exclusively to threatening communications sent through the mails. Under both the Post Office Clause and the Commerce Clause of Article I, Congress has the legislative authority to proscribe the sending of threats through the mails, whether or not the sender subjectively intended to threaten.[3]

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[3] Contrary to petitioner's suggestion (Pet. 8-9), Congress's authority to regulate threats sent by mail is not limited to those

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003

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sent from one State to another. Congress's power under the Constitution's Post Office Clause, Art. I, § 8, Cl. 7, is distinct from the Commerce Clause power and clearly reaches all items passing through the mails, "even if their passage is purely intrastate." *United States* v. *Elliott*, 89 F.3d 1360, 1364 (8th Cir. 1996) (affirming mail fraud conviction based on intrastate mailings and refusing to apply Commerce Clause analysis), cert. denied, 519 U.S. 1118 (1997). In any event, as this Court has recognized under the Commerce Clause, Congress may protect the channels and instrumentalities of interstate commerce "even though the threat may come only from intrastate activities." *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)); see *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 249-252 (4th Cir. 2001) (upholding, under the Commerce Clause, Congress's extension of the mail fraud statute to intrastate deliveries by private or commercial intrastate carrier), cert. denied, 535 U.S. 926 (2002).

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No. 02-1762

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE AGUILAR ESPINOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Mr. Jessie Aguilar Espinoza files the instant reply to address one new argument raised by the Solicitor General.

II. THE CIRCUIT SPLIT ON SPECIFIC VERSUS GENERAL INTENT HAS DIRECTLY IMPACTED MR. ESPINOZA

As explained in Mr. Espinoza's petition, the Ninth Circuit's holding in *United States v. King*, 122 F.3d 808, 811 (9th Cir. 1997) ("specific intent to threaten is required under § 876") is in direct conflict with the Fifth Circuit's decision in the instant case (holding that violation of the same statute requires only "general intent").

The Solicitor General's opposition attempts to brush aside this circuit split by claiming "petitioner's reliance on [the Ninth Circuit's decisions] is misplaced." Opp. at 9. The Solicitor General goes on to explain that if "knowingly" (as in the statute) means "with specific intent to threaten" (as interpreted by the Ninth Circuit), then inclusion of "knowingly" in the indictment satisfied the government's

burden of pleading intent. *See id.* at 9-10. This is incorrect as a matter of law and unfairly attempts to confuse the Court as to the position Mr. Espinoza was actually in.

Legally, as the Solicitor General admits, an indictment merely mirroring statutory language is sufficient only if "the statutory language itself expressly and unambiguously sets forth the elements needed to define the offense." Opp. at 6 (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Clearly, the "knowingly" language of the statute is not "unambiguous" when the Fifth and Ninth Circuit's flatly disagree on what that very word means. Thus, if "specific intent to threaten" is truly a requirement (as the Ninth Circuit has held), then Mr. Espinoza's indictment is defective.

Factually, and even more importantly here, Mr. Espinoza was convicted in Texas, under Fifth Circuit law. The Fifth Circuit interprets the statute's language – language appearing in both the statute and the indictment – as requiring

only general intent, not specific intent to threaten. So under Mr. Espinoza's Fifth Circuit indictment, specific intent to threaten was not an element pled by the government, and Mr. Espinoza had no opportunity to argue before a Texas jury that he lacked specific intent to threaten. With this argument unavailable, Mr. Espinoza had no reasonable choice but to enter the conditional guilty plea.

If Mr. Espinoza were instead charged with the same indictment under Ninth Circuit law, he could have explained to the jury that he never intended to threaten anyone (but rather was attempting to draw attention to abuses in the Texas state prison system and avoid subjecting himself to grave danger) and that the law and the indictment require the government to prove that he did have this intent. However, the Fifth Circuit's interpretation of § 876 foreclosed this possibility.

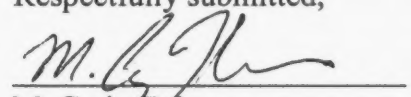
The vast difference between the procedural and substantive rights possible to Mr. Espinoza under Ninth

Circuit law compared to the lesser rights he was actually afforded under Fifth Circuit law illustrate exactly why the Court should grant certiorari to resolve this circuit split.

III. CONCLUSION

For the foregoing reason and for the reasons set forth in Mr. Espinoza's original petition, the Court should grant certiorari to correct the Fifth Circuit's error and to set forth one consistent standard for future prosecutions under § 876.

Respectfully submitted,



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